

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JARRELL A. MURRAY,

Defendant.

OPINION AND ORDER

10-cv-502-bbc
08-cr-87-bbc

Defendant Jarrell A. Murray's motion for post conviction relief is before the court. It raises a number of procedural questions about such things as the minimum requirements for a motion, whether (and when) a later filed brief relates back to the original motion and what kind of showing must be made to support equitable tolling of the time for filing a post conviction motion. I conclude that defendant's motion can be considered, conclusory as it is, that his subsequent brief relates back to the claims he raised in his motion and that it is not necessary to reach his claims of entitlement to equitable tolling or to equitable estoppel, but that if it were, they would have to be denied. Additionally, I conclude that defendant has failed to support his claims for post conviction relief with any facts or law and that his motion must be denied.

BACKGROUND

Defendant was charged with robbing two federally insured banks in the Madison area in May 2008. After he was arrested on the charges and arraigned, his counsel requested that defendant be examined to determine whether he was mentally competent to stand trial. The request was granted; defendant was found competent on April 24, 2009.

On May 26, 2009, defendant entered into a plea agreement, under which he agreed to plead guilty to three of the four counts of the indictment. He entered his plea on June 23, 2009 and was sentenced on August 21, 2009 to a term of 204 months. The judgment and commitment order was entered on August 24, 2009. He did not appeal, so his sentence became final ten days later, on September 5, 2009.

Defendant filed a motion for post conviction relief on August 30, 2010, within the one-year time limit for filing such a motion. He contended that his trial counsel had been ineffective in the pre-plea phase, in the plea phase, at sentencing and in failing to appeal on his behalf, but he gave no reasons for these contentions. He sought equitable tolling of the deadline for filing his motion to enable him to supplement his motion. In support of this request, he alleged that he had been trying unsuccessfully since April 2010 to obtain copies of the discovery, correspondence and court documents from his court-appointed trial counsel.

I gave defendant until October 4, 2010 in which to file a brief in support of his motion for post conviction relief, after pointing out that he had not made a showing that he had not had a fair opportunity to obtain the materials he said he needed to pursue his § 2255 motion. Defendant responded to this order on October 5, 2010, dkt. #4 (10-cv-502-bbc), saying that his trial counsel had never sent him any of the materials from his file, even though she had promised she would do so. In his response, he alleged that his trial counsel had not made an adequate investigation of the offense (although he had provided her exculpatory evidence she failed to verify), had not developed any trial strategy other than coercing him to plead guilty and had entered into plea negotiations without defendant's knowledge or consent. As to the plea phase of his case, defendant alleged that counsel had failed to investigate matters that had a negative impact on the plea bargaining process, had assured him inaccurately that his prior record would not have a negative effect on his sentence because the court would not consider it and had given him false information to persuade him to enter into a plea agreement. He says that he would have gone to trial had his trial counsel not given him false information.

At sentencing, defendant alleges, his trial counsel failed to object to the inclusion of his prior record in the presentence report, allowing him to be sentenced as a career offender. After sentencing, trial counsel failed to file a notice of appeal, although defendant directed her to do so.

The court files show that in response to letters from defendant and a request from the court, defendant's trial counsel advised the court in a June 7, 2010 letter that she had sent copies of all of her file materials to defendant, as he had requested. Her letter showed that a copy of the letter was sent to defendant.

Defendant wrote again to say that he did not have copies of his file materials. In an order dated October 27, 2010, I advised defendant that I was sending a copy of the order to his trial counsel in the expectation that she would send defendant additional copies of his case file and that he could have three weeks after receipt of the materials to develop his allegations about counsel's ineffectiveness. I added that it was unclear whether defendant would be entitled to equitable tolling.

On November 19, 2010, defendant moved for an order to compel his trial counsel to send him copies of his case file. On December 7, 2010, the court received a copy of a letter sent by trial counsel to defendant on November 30, 2010, in which she said that she was sending defendant duplicate copies of the computer discs and a DVD containing the discovery in defendant's case, along with videotapes from the case. Defendant continued to maintain that he had not received the materials, so I scheduled a telephone hearing with defendant, his trial counsel and a representative from the prison in which defendant was housed.

In the course of the hearing on January 7, 2011, the parties learned from the prison

representative that the materials counsel had sent to defendant on two different occasions had been returned by the prison because they were in boxes. Inmates expecting boxed mail are required to fill out a form in advance, advising the prison of the anticipated mailing. Counsel agreed to send the materials once again (omitting the CDs of discovery that she had sent the first two times because the prison does not allow inmates to receive or possess CDs) and defendant agreed to apply for the appropriate forms. By copy of a letter to defendant dated January 12, 2011, counsel advised the court that she had sent the duplicate paperwork yet again.

Since January 7, 2011, defendant has not communicated with the court about his case, although I notified him on March 30, 2011 that he could have until April 4, 2011 to supplement his filings. Thus, the record consists solely of his original motion and his October 5, 2010 response to the court's order.

OPINION

Defendant's initial vague and conclusory motion raises the question whether the court should have treated it as a § 2255 motion. Rule 2 of the Rules Governing Section 2255 Cases requires that a § 2255 petition "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." Rule 2(b)(1) and (2). Defendant's purported motion flunks this requirement. It includes *no* facts whatsoever in support of the

claims. As the court of appeals pointed out in Ellzey v. United States, 324 F.3d 521, 524 (7th Cir. 2003), this court could have rejected the motion and returned it to defendant, in which case it would be clear that defendant had not met the deadline for filing (unless he could have submitted an adequate motion on or before September 5.) But the motion was not returned and defendant amended it in effect by filing his October 5 response, in which he explained in slightly more detail how he believed his counsel had been ineffective. Mayle v. Felix, 545 U.S. 644 (2005), holds that the court cannot consider such an amendment if it contains new claims or new theories (and abrogates Ellzey to the extent it held otherwise) but defendant did not assert any new claims. In Mayle, the question was whether a state inmate seeking federal habeas corpus relief under 28 U.S.C. § 2244 could add new claims to relief to a timely filed petition. The Supreme Court held that he could not if the new claims were filed after the one-year time limit applicable to habeas petitions had expired and if they differed in both time and type from those set forth in the original petition. In those circumstances, the new claims did not relate back to the original petition and thus did not escape the one-year time limit. Defendant's amendment is not barred by Mayle because it related to the claims he asserted in his original motion.

This conclusion does not save defendant's motion because his amendment adds almost nothing to his claims. He has alleged that his counsel was ineffective because she failed to investigate the offense, but he has not supported this allegation with any

explanation of what counsel would have discovered had she conducted a more thorough investigation. Hardamon v. United States, 319 F.3d 943, 951 (7th Cir. 2003) (when alleged deficiency is failure to investigate, defendant cannot proceed unless he provides “the court sufficiently precise information, that is, a comprehensive showing as to what the investigation would have produced”). Whether a defendant who pleaded guilty can establish prejudice from counsel's failure to investigate depends on whether he can show that the information that might have been discovered “would have led counsel to change his recommendation as to the plea.” Hill v. Lockhart, 474 US. 52, 58-60 (1985). Defendant has not provided any reason to think that a different investigation would have uncovered exculpatory evidence. Therefore, this allegation would have to be disregarded.

Defendant makes a similarly conclusory allegation about his counsel’s failure to develop any trial strategy. Without any evidence to suggest that any ground existed for a different strategy other than negotiating the best possible plea, defendant falls far short of showing that his counsel was constitutionally ineffective. Defendant says that he provided counsel with “exculpatory evidence she could easily have verified,” dkt. #4 at 2 (in 10-cv-502-bbc), but he does not identify any of that evidence. It is hard to conceive of any strategy defense counsel could have pursued other than negotiating a plea. The evidence against defendant was extensive. One of his co-defendants had pleaded guilty to participation in the robbery before defendant returned from his competency examination and

that co-defendant was presumably available to testify against defendant. Defendant has not shown that his counsel had any option but to try to negotiate a favorable plea agreement for him.

As for defendant's allegation that counsel entered into plea negotiations without his knowledge, he does not explain how he was harmed by this effort. Had he thought the plea agreement that was ultimately negotiated was improper or unfair in any respect, he was free to reject it. As it turned out, he told the court that he understood the agreement and accepted it and that it represented the totality of the promises that had been made to him. Plea hrg. trans., dkt. #369 (in 08-cr-87-bbc) at 13-14.

Defendant argues that counsel told him that his prior record would have no effect on his sentence and that the court would not consider it. This is in direct contradiction to his statement at his plea hearing that he understood that the sentencing recommendation would take into consideration his prior criminal record. *Id.* at 9. The Court of Appeals for the Seventh Circuit is not receptive to allegations that conflict with statements made in open court. United States v. Peterson, 414 F.3d 825, 827 (7th Cir. 2005) ("Judges need not let litigants contradict themselves so readily; a motion that can succeed only if the defendant committed perjury at the plea proceedings may be rejected out of hand unless the defendant has a compelling explanation for the contradiction."); United States v. Martinez, 169 F.3d 1049, 1054 (7th Cir. 1999) ("Because of the great weight we place on these in-court

statements, we credit them over his later claims [that he would not have pleaded guilty.]”).

Defendant argues that counsel compounded her failure to tell him that the court would consider his prior record by not objecting to the inclusion of his prior record in the presentence report. This is simply a variation of the same allegation that does not advance the claim of ineffectiveness.

As for defendant’s allegation that his counsel gave him false information to persuade him to enter into a plea agreement, defendant has not identified what that information might have been. Therefore, it is unnecessary to discuss this allegation.

Finally, defendant alleged that his trial counsel failed to file a notice of appeal, although defendant directed her to do so. Defendant has not supported this allegation with any specific information, such as exactly what he said to counsel, where he was when he talked to her about an appeal and whether any other persons were present when the conversation took place. A mere assertion is not enough to support his allegation that his counsel failed to take the simple action of filing a notice of appeal, particularly when defendant never asked about an appeal in any of the many letters he wrote to the court after his sentencing.

Because I have decided that defendant’s motion may be considered as amended, it is not necessary to reach defendant’s assertion that he is entitled to equitable tolling. If I were to reach the issue, I would conclude that defendant has failed to show any reason to toll his time for filing. Such tolling is available to habeas petitioners (and presumably to federal

inmates as who are moving for post conviction relief under § 2255), but only if the petitioner “shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Holland v. Florida, 130 S. Ct. 2549, 2553 (2010).

The record does not show that defendant pursued his rights diligently, but was prevented by some extraordinary circumstance from completing his motion within a year. He has not described any steps he took to prepare a post conviction motion until April 2010, approximately seven months after his sentencing, when he met an inmate at Butner he thought could help him. Dkt. #1 (filed in 10-cv-502-bbc). At that point, but not before then, he tried to obtain his files from his trial counsel (who has continued to maintain that she provided defendant copies of everything in his file during the time she represented him and who mailed them again to defendant at Butner at least once before his deadline for filing had run.) It appears that defendant never checked with prison authorities about his mail and why it did not arrive. It appears that he finally received the copies once the court held a conference with him, his counsel and the prison and learned that defendant had to advise the prison that he was expecting boxed mail because he had stopped requesting copies of his trial materials.

Moreover, defendant has not explained why he needed any of the file materials. He alleged in his October 2010 response to the court that his lawyer failed to do any

investigation despite his giving her “exculpatory evidence she could easily have verified.” Dkt. #1 at 4. He did not explain in his response what this evidence was, but he would not have needed his file materials to identify the evidence he gave her. He did not need the file materials to know when he made this request of counsel and where they were. He alleged that counsel had given him inaccurate or false information about his sentencing exposure but did not say what it was. Again, he did not need his counsel’s files to know what she told him and what effect it had on him. I cannot find that defendant’s is one of the rare situations that qualifies for equitable tolling.

Additionally, if it were necessary to reach the question of equitable estoppel, I would find that it is inapplicable. Defendant has failed to show any act or omission by the government that kept him from filing a timely motion for relief.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not

made a substantial showing of a denial of a constitutional right so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Jarrell A. Murray's motion for post conviction relief under 28 U.S.C. § 2255 is denied for defendant's failure to show that he is in custody in violation of the Constitution or laws of the United States or that his sentence is illegal in any respect. Defendant's motion for equitable tolling is DENIED as moot.

Entered this 6th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge